



## IOWA TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION

Barb Kniff McCulla	Timothy L. Lapointe	Robert F. Holz	Steven Olson
CHAIR	Krista Wenzel	Annette Dunn	Rob Sand

Randy Goddard, Executive Director

Governor Kim Reynolds

Lt. Governor Adam Gregg

### **Iowa Telecommunications & Technology Commission Grimes State Office Building, 1<sup>st</sup> Floor 400 East 14<sup>th</sup> Street, Des Moines, IA 50319 Meeting Minutes August 25, 2021**

#### **FINAL**

To ensure the most efficient use of State resources, the August 25, 2021, ITTC meeting was held via video conference pursuant to Iowa Code section 21.8. A video conference ensured that more Commissioners, staff, and the public were able to participate in the meeting and reduced the risk of delays caused by the public health recommendation. The meeting was accessible to members of the public.

#### **Roll Call:**

##### **Commissioners Present**

Barb Kniff McCulla, Chair (on-site)  
Bob Holz, Member (on-site)  
Steven Olson, Member (on-site)  
Timothy Lapointe, Member (video)  
Krista Wenzel, Member (video)

##### **Commissioners Absent**

John McCormally, Representing Rob Sand, Ex-Officio Member  
Matt Behrens, Representing Annette Dunn, Ex-Officio Member

##### **Iowa Communications Network Staff**

Randy Goddard, Executive Director  
Mark Johnson, Chief Administrative Officer  
Scott Pappan, Chief Technology Officer  
Deb Evans, Chief Financial Officer  
Lori Larsen, Executive Officer 2 (Recorder) (on-site)

##### **Guest Attendees**

Michelle Rabe, Attorney General's Office, Conflict Counsel for ITTC  
Alan Nagel, Attorney General's Office, Counsel for ICN  
Mark A. Schultheis on behalf of Inmate Calling Solutions  
Patrick White, on behalf of Inmate Calling Solutions  
Charlena Aumiller, on behalf of Inmate Calling Solutions  
Ray Warner, Aureon  
Bill Wickard, Counsel for Securus  
Ryan Koopmans, Counsel for Securus

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### **Call to Order:**

Chair Kniff McCulla called the meeting to order at 1 PM. It was noted that a quorum of members was present for the meeting.

### **New Business:**

Chair Kniff McCulla opened the meeting by reading the action items.

Michelle Rabe asked if counsel for Securus or ICS could tell the Commission briefly what the arguments were before the ALJ yesterday, just the issue that was presented at the hearing.

Mark Schultheis – It was a pre-hearing conference held on the August 18. Judge Lindgren addressed a motion to dismiss or stay that was filed by Securus. He listened to argument from both sides and took the matter under advisement.

Michelle Rabe – There has been no ruling, correct?

Ryan Koopmans – Correct. That was before the last meeting, he was looking to see what the Commission might do.

Michelle Rabe – That was on August 18?

Ryan Koopmans – Correct, the morning of the 18th.

Chair Kniff McCulla – The next meeting before the Judge is the hearing on Sept 1?

Michelle Rabe – The next meeting that I am aware of is the meeting on September 1.

Alan Nagel – Well, ICN has a meeting scheduled before the ALJ later today.

Michelle Rabe – What is that for?

Alan Nagel – That is a Motion to Continue by ICS, which is resisted by the ICN. The ICN wishes a Stay should be granted.

Chair Kniff McCulla – Alan, I understand that you are meeting with them today for the ICN, correct?

Alan Nagel – Yes, I represent the ICN before this Commission today.

Chair Kniff McCulla – Is there anything else out there that the ITTC is unaware of.

Charlena Aumiller – ICSolutions filed the Motion of Continuous, since we have not received all of our discovery yet, which was due Monday, August 23. Is that correct Mark?

Mark Schultheis – Yes, that is correct. Also, ICS filed a Motion to Consolidate before the Commission. I assume you have seen at this point.

Chair Kniff McCulla – Yes. Any other comments before we go into closed session?

Alan Nagel – Would the Commission like to hear argument from us? Or just some comments?

Chair Kniff McCulla – That would be fantastic.

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Alan Nagel – I am just proposing it, it is only if the Commission wants it.

Commissioner Wenzel – I think that would be useful.

Alan Nagel – Does the Commission have a preference in what order? I would be happy to go first since I proposed it.

Commissioner Lapointe – We can hear arguments or overviews, but any discussion would be in closed session and the discussion would be in advice of counsel. This would not be an interactive exchange, but you can summarize your positions, I think that would be helpful to us as Commissioners.

Alan Nagel, *representing the ICN* – In your ruling on the applications for rehearing and supplemental intermediate agency ruling (21ICN-001), in that case you corrected the ICN and Securus, we thought it was your final decision. You came back to us, and said no, that decision is preliminary, procedural, intermediate agency action on the procurement, and that is still pending before you. You then provided direction to the ICN [a number of options], one of which included reevaluation of the RFP. The ICN and Securus took you at your word. The ICN went on to reevaluate the RFP, there was no petition for Judicial Review challenging the negative ruling for Securus and the ICN. We took you at your word. The ICN completed that reevaluation, as you suggested we might, and released a Notice of Intent to award to Securus. ICS appealed that award, but not to you. ICS decided that your ruling had in fact been final, despite you stating that it was preliminary in nature, and they brought in an appeal before ALJ in 22ICN-001. At this point, the ICN's hands were tied. The ICN was required by rule - it says 'we shall' - required by rule to act on behalf of the commission and contact the Department of Inspections and Appeals, and initiate this new action in front to the ALJ right now (22ICN-001). Now the ICS claims that despite the fact that they treated your ruling as final, when it was not, you can't do anything to stop it. Now that the separate appeal is moving forward, despite the fact that it is violates your own ruling, you have no statutory basis to stop it. Alternatively, ICS claims it is ICN's fault, since we had the authority to violate our own rules, and retain it (their appeal) and send it directly to you, instead of sending it down to the ALJ. We insert that we did not and we were bound by law to do what we did. Finally, ICS claims that you can do nothing about it, and they are entitled to an evidentiary hearing on their new claims. Again, we resist that, they should not be entitled to the evidentiary hearing, they should go back directly before you. If they want the evidentiary hearing, they can come to you in this case, and request that it be remanded to the ALJ for an evidentiary hearing on their new claims. Now we don't think they should get there, for some of the reasons Securus points out, that their claims are waived. But even if you reach that point, they should reach the evidentiary hearing through you, they should not be going on their own, directly back to the ALJ. Because they violated your ruling and tried to appeal somewhere else, the rest of the process, even if lawful, should be considered tainted. You may wonder why does this matter? Why are we having such a big fuss about if this is proceeding in 21ICN-001 or 22? First, regardless of whether you remand back to ALJ for further consideration, we could have reached the heart of ICS claims, all legal in nature, far more quickly in this case, then we will in 22ICN-001. Right now, because we are going through this onerous two-track process of discovery and depositions and evidentiary hearings in 22-001, we could have reached this much more quickly before you. There is a good case that we could have reached this more quickly before you. ICS currently holds the contract, and while they may have meritorious basis for an appeal, they also currently hold the contract, and continue to reap money from the ICN, while we would like to move on with Securus. So far, the ICS is able to take advantage of the fact that you are a Commission, you are not a director, not sitting at the ICN all the time, making decisions all the time. You have to convene to meet. They have taken advantage of that and started an appeal and are now presenting it to you as fait accompli, we want to put that to a stop. The ICN understands that you may need time to contemplate, but we are hoping today you can orally or in a short-written decision offer a



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Stay of the opinion below, until you can decide what needs to be done in this case. Beyond that we ask you to dismiss this matter for the reasons we have stated above including those stated by Securus and others in briefing.

Commission Holz – Alan, you have indicated at the opening of your statement, that this Commission had dealt with the RFP. I take issue with that, the order only dealt with reconsideration, re-evaluation of the proposals of the two parties, and not of the RFP.

Alan Nagel – The proposals of the two parties stem from the RFP. When you came back, and we said, please write this down we think it is a final ruling we need to have it for posterity potentially for an appeal. You came back and said, based on our responses, no, it is not final in nature, it is preliminary and procedural. You are right, you did not directly address what we should do with the RFP, you gave a range of options and suggestions, including reissuing the RFP. One of the other suggestions was re-evaluate the RFP, which is what the ICN did in this case. I hope that is responsive to your question.

Ryan Koopmans, *counsel for Securus* – We filed a request with this Commission to enter a final ruling as Alan said. You declined to enter a final ruling last time on this RFP, waiting to see what happened in the re-evaluation. ICS has now appealed again, but their challenge is not anything that happened in the evaluation, it is not a complaint on how the proposals were scored, instead ICS is arguing we wasted our time last winter and last year with litigation. ICN could never have awarded this contract to Securus, and that Securus should have been disqualified. Those arguments should have been made and could have been made last time, the Commission should not hear them anymore. They decided not to make those arguments before you last year, therefore this appeal should be over, the Commission should enter a final decision. If ICS would like to appeal that to District Court, it of course may. We have been at this procurement for over a year now, our clients submitted their bids over a year ago. The purpose of procurement is to let the State move forward in a costly and effective manner while giving everyone due process, more process has already been given to ICS than is needed or deserved, and we think it is time to put this one to rest.

Mark Schulthuis *counsel for ICS* – With all due respect to Mr. Nagel, the way he framed this is inaccurate. ICS did not appeal to the Department of Inspections and Appeals (DIA). ICS filed an appeal as directed by the ICN in its Notice of Intent to Award and as required by the ICN rules. The Appeal was properly filed, timely filed, and no one has claimed otherwise. The action was sent to DIA, and is now pending before Judge Lindgren. That was all according to the law and rules, and this Commission so directed us to do so. Our point is we are entitled to an appeal, we are entitled to a hearing on the appeal, this is a new notice of intent. We followed the procedures as both the rules and Commission directed us to. The argument of Securus is also flawed in two respects: a) They are seeking to address the legal arguments that are pending before Judge Lindgren. We have not had an evidentiary hearing, we have not conducted any dispositions at this point. The ICN has failed to timely respond to discovery, nothing else has taken place other than this legal wrangling that has been started by Securus. The Notice of the Appeal raised a legal argument and it also raised the argument that the decision is not in the best interest in the State of Iowa. To characterize it as simply something that could have been raised before is also inaccurate. Our position here is simple, we timely filed a notice of appeal, we properly filed it, it is required by the law, and it is before the judge. Thank you.

Charlena Aurmillier – I would like to add that there was seven months of this past time since it was initially awarded that it was out of our hands, it was being re-evaluated. We have timely responded anytime that we have gotten something that we can respond to. To the Commissioner's point that the reason they made it a preliminary order in the case number 21ICN-001, because the procurement is still open, and that was explicitly put it in there and there was guidance. I actually think they didn't suggest reissuance, they said reissuance would be costlier than re-evaluation. Even ICN admits that we had meritorious claims. What they are trying to do is get a final order on a preliminary appeal of a procurement that is still



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open. To put a final order on that would limit any appeals between those same bidders later on. That is not in the best interest of the ITTC. We are trying to expedite this as much as possible. We would be willing to do depositions tomorrow, but we can't do depositions without being prepared with discovery. They are not giving us discovery, but they just disagree that we are able to appeal. If a final order can happen on one appeal/protest and that limits any ability to protest later on, on the same procurement, then what would stop every agency from issuing a re-evaluation and asking for a re-award to the same vendor, so you can basically mute any protest later on. Thank you.

Chair – Any more comments out there?

Alan Nagel – May I briefly?

Chair – Yes.

Alan Nagel – There was a claim in the final argument there that the ICN is not working on discovery in the case below, because we don't believe it should precede. That is not true, the ICN is continuing to work on discovery. There was also a claim that ICN asserted that ICS' claim was meritorious. ICN does not claim that. The ICN in its argument claimed that even if they were meritorious that it should proceed before this Commission.

### Transition to Closed Session

Commissioner Holz made a motion to move into closed session pursuant to Iowa Code section 21.5(1)(c) and (f), for the specific purpose of discussing strategy with counsel in matters that are presently in litigation or where litigation is imminent where its disclosure would be likely to prejudice or disadvantage the position of the governmental body in that litigation and/or to discuss the decision to be rendered in a contested case conducted according to the provisions of chapter 17A. Second by Commissioner Olson.

#### *Roll Call Vote*

Commissioner Holz – Yes

Commissioner Olson – Yes

Commissioner Lapointe – Yes

Commissioner Wenzel – Yes

Chair Kniff McCulla – yes

The motion passed unanimously.

*The Commission convened in closed session at 1:22 PM. Those remaining in the room and on the Zoom call included the Commission members, Michelle Rabe, and the recorder.*

### Closed Session

- Closed session minutes separate.

### Return to Open Session

*The Commission reconvened in open session at 2:18 PM.*

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Commissioner Lapointe moved that the Commission grants the authority and directs the ITTC counsel Michelle Rabe to draft an order for the signature of Chair Kniff McCulla consistent with the discussions in closed session. Commissioner Wenzel seconded the motion.

### *Roll Call Vote*

Commissioner Holz – Abstain

Commissioner Lapointe – Yes

Commissioner Olson – Yes

Commissioner Wenzel – Yes

Chair Kniff McCulla – Yes

The motion passed.

### **Public Comment:**

None

### **Adjournment:**

The ITTC meeting adjourned at 2:19 PM.

### **ATTESTED TO:**

*Barb Kniff McCulla - Chair, Iowa Telecommunications and Technology Commission*